

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ALTHEA LEVESQUE,)	
)	
Plaintiff)	
)	
v.)	Civil No. 91-167 B
)	
LOUIS W. SULLIVAN, Secretary)	
of Health and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Supplemental Security Income appeal raises the question whether substantial evidence supports the Secretary's finding that plaintiff Althea Levesque retains the ability to perform a full range of light and sedentary work despite arthritic back pain and an alleged mental impairment. The plaintiff argues that the Secretary erred at Step Five of the sequential evaluation process by failing to consider the effects of her mental impairment and the side effects of her medication.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative

¹ This action is properly brought under 42 U.S.C. ' 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 26, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

Law Judge found, in relevant part, that the plaintiff suffers from moderate obesity, mild degenerative arthritis of the lumbar spine with partial sacralization of L-6 and a moderate dysthymic disorder, but that she does not suffer from any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Findings 2-3, Record p. 16; that her allegations of incapacity are ``greatly out of proportion to the objective medical evidence" and her testimony and statements not fully credible, Finding 7, Record p. 16; that at all times relevant she has retained ``the residual functional capacity to perform a full range of work activity of a light and sedentary exertional level" and that her ``non-exertional impairments impose only slight restrictions on her activities of daily living and would seldom produce deficiencies of concentration, persistence, or pace that would result in failure to complete tasks in a timely manner, in work settings or elsewhere," Finding 6, Record p. 16; that she is unable to perform her past relevant work, Finding 8, Record p. 16; that the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the ``Grid"), direct a conclusion that Levesque is capable of performing significant numbers of jobs in the national economy, Finding 9, Record p. 16; and that accordingly the plaintiff is not disabled, Finding 10, Record p. 16. The Appeals Council declined to review the decision,² Record pp. 3-4, making it the final determination of the Secretary. 20 C.F.R. ' 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by

² The Appeals Council rejected the plaintiff's contention that the Administrative Law Judge did not adequately evaluate the reports of the consultative examiners, Dr. Temeles and Dr. Gallon. Record p. 3. The Council noted that the Administrative Law Judge discussed both doctors' finding that the plaintiff is entrapped in a chronic pain lifestyle, as well as Dr. Temeles' conclusion that the plaintiff is not significantly limited by her mental impairment and should be trained to become self supporting. *Id.*

such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record therefore must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

A. Mental Impairment

The plaintiff asserts that the medical evidence of record supports a finding that she suffers from a somatoform pain disorder. A somatoform disorder is a mental impairment characterized by "[p]hysical symptoms for which there are no demonstrable organic findings or known physiological mechanisms." 20 C.F.R. pt. 404, subpt. P, app. 1 ' 12.07. The record contains two medical reports that address the issue of whether the plaintiff has a mental impairment. A consulting psychiatrist, Dr. Lawrence Temeles, who examined the plaintiff at the request of the Social Security Administration in June 1990, diagnosed her as having a somatoform pain disorder and a dependant personality disorder. Record p. 12; Exh. 25, Record p. 212. However, he was of the opinion that the disorders do not significantly limit her functioning. Exh. 25, Record pp. 214-16. Specifically, he stated that she has a very good ability to follow work rules, relate to co-workers, understand, remember and carry out

complex job instructions and has a good ability to maintain personal appearance, behave in an emotionally stable manner, relate predictably in social situations and demonstrate reliability. *Id.* pp. 214-15. He urged that she be trained for a job in which she could support herself, noting that it would be "very important for her." *Id.* p. 213. In a separate examination, psychologist Robert L. Gallon found that the plaintiff "seems entrapped in a chronic pain lifestyle in which pain may be an important part of her coping" and that "[d]epression and other psychosomatic factors appear to be playing a large role in this pain." Exh. 20, Record p. 191.

The Administrative Law Judge discussed both of these medical reports in his decision in which he concluded that the plaintiff did not suffer from a somatoform disorder. Record p. 12. He found that Dr. Temeles' diagnosis was not supported by the objective medical evidence in the record but noted that, in any event, the doctor stated that the plaintiff's disorder did not functionally limit her. *Id.* The Administrative Law Judge then credited Dr. Gallon's report, which he interpreted as indicating that the plaintiff did not suffer from a somatoform pain disorder. *Id.*

Resolving conflicts in the evidence and drawing conclusions therefrom is the province of the Secretary. *Ortiz v. Secretary of Health & Human Servs.*, No. 91-1471, slip op. at 13 (1st Cir. Dec. 9, 1991) (citing *Rodriguez*, 647 F.2d at 222). However, his conclusions must be supported by substantial evidence. His finding that the plaintiff does not suffer from a somatoform disorder is surprising given the medical evidence presented. Dr. Temeles found such a disorder present and Dr. Gallon commented that Levesque suffers from a psychosomatic illness. The Administrative Law Judge apparently interpreted the psychologist's failure to use the term "somatoform" in his diagnosis to mean that Dr. Gallon did not find that she suffered from such a disorder. It appears evident, however,

³ The term psychosomatic refers to "[d]isorders that have a physiological component but are thought to originate in the emotional state of the patient" *Taber's Cyclopedic Medical Dictionary* 1184 (14th ed. 1983).

that a diagnosis of psychosomatic illness is the equivalent of a somatoform disorder diagnosis, which would contradict the Administrative Law Judge's conclusion, and the Secretary conceded as much at oral argument. In any event, it is clear that both Dr. Temeles' and Dr. Gallon's diagnoses suggest a mental impairment that required evaluation.

Levesque contends that the Administrative Law Judge ignored the impact of her mental impairment in assessing her residual functional capacity. In evaluating residual functional capacity the Secretary must determine the effect of any limitation on the plaintiff's ability to work. An impairment that is not severe enough to meet or equal any listed impairment may still result in disabling limitations on a claimant's ability to work. 20 C.F.R. ' ' 416.945, 416.961. In a case of mental impairment, the Secretary evaluates essentially the same functional areas as are applicable at the severity and listing steps and relies on essentially the same evidence, although "[c]onclusions of ability to engage in [substantial gainful activity] are not to be inferred merely from the fact that the mental disorder is not of listing severity." Social Security Ruling 85-16, reprinted in *West's Social Security Reporting Service* at 425 (Supp. 1991). The listing⁴ for somatoform disorders involves, *inter alia*, evaluation of the following four factors to determine severity of impairment:

1. Marked restriction of activities of daily living; []
2. Marked difficulties in maintaining social functioning; []
3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); []
4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from

⁴ The Listing of Impairments, Appendix 1, Subpart P, Part 404, describes physical and mental impairments in terms of specific medical criteria and functional limitations; if an impairment meets the listing requirements, then it is considered to be disabling regardless of age, education or work experience. 20 C.F.R. ' ' 416.920(d), 416.925(c).

that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behavior).

20 C.F.R. pt. 404, subpt. P, app. 1, ' 12.07(B)(1)-(4).

Having found no somatoform disorder at Step Three, the Administrative Law Judge did not proceed to reevaluate the impact of the plaintiff's asserted mental impairment on her residual functional capacity at Step Five. However, despite his failure to find that the plaintiff suffered from a somatoform disorder, the Administrative Law Judge did evaluate the plaintiff at Step Three according to the second and third criteria and found no limitations whatsoever based on Dr. Temeles' findings. Record p. 12. He noted that Dr. Temeles found her ability to function socially to be very good. *Id.* Likewise, he commented that the record reflects no limitation on her ability to `` maintain attention, and to maintain concentration." *Id.*

Nothing in the record suggests that the Administrative Law Judge evaluated the plaintiff's residual functional capacity specifically within the context of the first and fourth criteria (daily activity and deterioration/decompensation). However, he did discuss restrictions on the plaintiff's daily activities in reference to her exertional capacity and found that her activities were not markedly restricted. *Id.* p. 15. He noted that she is able to fix her own meals, make beds, do light laundry, wash dishes, visit with friends and slow dance. *Id.*; see Exh. 8, Record p. 71; Exh. 25, Record p. 210. The Administrative Law Judge did not discuss the fourth criterion, yet there appears to be no evidence presented in the record for his consideration, just as there was none regarding the third criterion. Therefore, although the Administrative Law Judge did not make an orderly Step Five evaluation with specific findings as to the impact of the plaintiff's asserted mental impairment, his error was harmless because he discussed the criteria concerning which there was evidence in the record and found no significant limitation. There was no medical evidence presented that contradicts the findings of Dr. Temeles, upon which the Secretary was entitled to rely, and thus there was substantial evidence

supporting the Secretary's findings on the mental impairment issue.

B. Side Effects of Medication

The plaintiff also asserts that the Secretary erred by summarily dismissing her claim concerning medication side effects when he evaluated her residual functional capacity. She testified that along with taking Advil she takes Traxodone twice daily, 50 m.g. in the morning and 100 m.g. at night, to control her depression.⁵ Record pp. 29-30, 34; Exh. 26, Record p. 218. Asked whether she experiences any adverse side effects from her medications she responded: ``Yeah. They make me feel dizzy, they make my eyes feel like they's just crossing right over when I -- they take affect [sic] and I have to go to bed." Record p. 30. She testified that she routinely lies down in the morning about 11:00 or 11:30 because of her back pain and the drowsiness caused by the medication. *Id.* pp. 36-37. There is no evidence as to the length of time she is required to lie down, nor is there evidence that she complained of medication side effects to her doctors or that they ever commented on the issue.

⁵ The medication Traxodone, *see* Record p. 14; Exh. 25, Record p. 211, was apparently misspelled ``Trazodone" in the hearing transcript, *e.g.*, Record pp. 30, 34, 36.

The Administrative Law Judge dismissed Levesque's side-effects claim as not credible. He commented that the plaintiff had not complained to her doctors about medication side effects and he noted that because she takes Traxodone to sleep at night he ``attache[d] little significance to her complaints that it makes her drowsy" because ``apparently it should." *Id.* p. 15. He did not, however, evaluate the impact of her taking Traxodone each morning, which she testified made her drowsy during the work day.⁶ Furthermore, the Administrative Law Judge stated that he found the plaintiff's testimony not credible and exaggerated as to side effects because in a June 12, 1990 statement she said she took Advil once in a while, whereas on August 2, 1990 she testified that ``she eats Advil tablets by the bottle." *Id.* pp. 15, 30; Exh. 26, Record p. 218.

The Secretary may not ignore the issue of the side effects of medication simply because the

⁶ Nor did the Administrative Law Judge mention the testimony of vocational expert Cynthia A. Flint-Ferguson who stated that any drowsiness and dizziness due to taking medication in the morning would require that the plaintiff ``avoid any occupation where she would have to go in first thing in the morning." Record p. 45. Furthermore, the expert testified that drowsiness requiring the plaintiff to lie down three or four times per day would rule out any gainful employment. *Id.* p. 40. Flint-Ferguson also stated that, if the plaintiff needed only to lie down twice per day during work hours for about five minutes each time, under most circumstances she would not be precluded from performing a job consisting of light or sedentary work. *Id.* pp. 41-44. At oral argument the Secretary relied on Flint-Ferguson's last answer as evidence supporting the Administrative Law Judge's finding that if the plaintiff in fact suffers from any medication side effects they do not disable her from performing all light and sedentary work. However, the evidence does not reveal for how long the plaintiff must lie down, and given the claimed potency of the medication's side effects it is hardly logical to simply assume that the hypothetical five-minute periods on which the vocational expert's opinion rests would be sufficient.

claimant's testimony comprises the only evidence of record that such side effects exist. *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551, 553-54 (1st Cir. 1978). However, this is precisely what the Administrative Law Judge did in this case. He did not seek the assistance of experts in determining the validity and severity of the asserted side effects as the court recommended in *Figueroa*, nor did he otherwise inquire about these issues. *Id.* Furthermore, the Administrative Law Judge failed even to consider what, if any, impact the medication that the plaintiff takes in the mornings has on her residual functional capacity, despite her complaint that it makes her drowsy during the work day.

To be sure, the plaintiff's claim that she takes Advil by the bottle appears quite inconsistent with her statement that she takes it only once in a while. However, the phrase "once in a while" does not preclude the possibility that the plaintiff takes Advil in large quantities but only when she is in great pain. Additionally, to someone who takes medication twice daily, as the plaintiff does, the phrase "once in a while" may mean more often than the Administrative Law Judge contemplates. In any event, while the plaintiff's claim may be exaggerated, as a lay person the Administrative Law Judge is not in a position to disbelieve her testimony regarding the side effects of Traxodone, which she testified was the primary offender in causing drowsiness.⁷ *Figueroa*, 585 F.2d at 554. "It would have been appropriate for the administrative law judge to have sought further medical evidence, or to have made some further inquiry, since [the plaintiff] raised the question." *Id.* (citation omitted).

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further medical inquiry into the impact of any side effects of the plaintiff's medications and a proper assessment thereafter of her residual functional capacity.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or

⁷ The Secretary contended at oral argument that the medical record indicates that Levesque is no longer experiencing depression and that therefore she does not need to continue taking the medication that she complains has adverse side effects on her. It is not for the Secretary to make such medical judgments.

proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of March, 1992.

*David M. Cohen
United States Magistrate Judge*